

ESA Requirements & the Corps Regulatory Program

The Regulatory Branch of the U.S. Army Corps of Engineers (Corps) evaluates applications for permits for work in waters of the U.S. [33 CFR Parts 320 through 330; 40 CFR Part 230]. The Corps regulatory program is based on its authorities pursuant to the Rivers and Harbors Act of 1899, the Federal Water Pollution Control Act, as amended (Clean Water Act), and the Marine Protection, Research, and Sanctuaries Act of 1972 (Ocean Dumping Act). At the conclusion of the evaluation process, the Corps decides to either issue or deny the permit for the proposed work.

The Corps permit decision is considered a Federal action that must comply with the Endangered Species Act (ESA). The ESA is administered by the National Marine Fisheries Service (NMFS) and the U.S. Fish and Wildlife Service (USFWS). NMFS has ESA jurisdiction over salmon, other marine fish, marine mammals, and marine reptiles. USFWS has ESA jurisdiction over birds, terrestrial animals, plants, amphibians, and most freshwater fish. Under Section 7 of the ESA, the Seattle District Corps must consult with the NMFS and the USFWS on its permit program on any permit application for proposed work which may affect threatened or endangered species, or their designated critical habitat. With listings of many fish species as threatened or endangered, the majority of permit applications in the state of Washington will likely involve some elements that require Section 7 evaluation. In addition to fish, other threatened and endangered plants and animals occur in various areas of the state.

Under the Corps' Federal permit program, permit applications must be reviewed for the potential impact on threatened and endangered species pursuant to Section 7 of the ESA. The Corps,

through informal and formal consultation procedures with the NMFS and USFWS, must evaluate information on the presence of listed species (including timing and life stages), habitat for such species and their prey sources, and other parameters. The information required for ESA evaluation must be prepared in the form of a Biological Evaluation (BE) which is utilized to assess project impacts to listed, and/or proposed species and designated and/or proposed critical habitat. The Corps will use the BE to determine whether the project may affect listed species or their critical habitat. If the Corps determines that work proposed in the permit application would have no effect on all threatened or endangered species, no further consultation with NMFS and USFWS is required. The Corps has developed guidelines for "No Effect" situations, for both freshwater and marine environments. If the Corps determines that the work proposed in a permit application may affect any threatened or endangered species, some kind of consultation with NMFS and USFWS is required. The two types of consultation are informal or formal.

Informal Consultation If the effects of the proposed work on listed species would be beneficial, or the potential adverse impacts are insignificant and discountable, then the Corps determines that the project may affect, but not likely to adversely affect the species or critical habitat. The Corps would then forward the BE to NMFS and USFWS (based on the species affected) and request that they concur with the "not likely to adversely affect" determination. Once concurrence is granted, the consultation process ends. If NMFS or USFWS finds that the project will have significant adverse effects on listed species or critical habitat and can not concur with the "not likely to adversely affect" determination, then formal consultation commences.

Formal Consultation If the proposed work may have more than insignificant and discountable adverse impacts to listed species or critical habitat, then the Corps determines that the project may affect, is likely to adversely affect the species or critical habitat.

The Corps then refers the BA to NMFS and USFWS (based on the species affected) to initiate formal consultation. NMFS and USFWS prepare a biological opinion (BO) that documents whether the project will jeopardize the continued existence of the species or destroy or adversely modify critical habitat. If the BO finds that the project will jeopardize the species, then the Corps will generally deny the permit. Projects that will not jeopardize the species must comply with the terms and conditions of the BO. Formal consultation ends with receipt of the BO. For questions related to ESA and Corps policies and procedures, please contact [Marcy Reed](#), telephone (206) 764-5529, or [Maryann Baird](#), telephone (206) 764-5531.

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